Office - Supreme Court, U.S.
FILED
JUL 11 1982
ALEXANDER L. STEVAS,
CLERK

82-59

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

JACK BROCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

THEODORE KLEIN
FINE JACOBSON BLOCK KLEIN
COLAN & SIMON, P.A.
Attorneys for Petitioner
JACK BROCK
2401 Douglas Road
P.O. Box 340800
Miami, Florida 33134
(305) 446-2200

QUESTIONS PRESENTED

I. DOES THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICT WITH THIS COURT'S RECENT RULING IN PAYTON v. NEW YORK, 445 U.S. 573 (1980) AND WITH U.S. V. JOHNSON, ____ U.S. ____, ___ S.Ct. ____, ___ L.Ed.2d ___, Case No.: 80-1608 (June 21, 1982)?

II. IN DECIDING THAT PRE-PAYTON LAW IN THE FIFTH CIRCUIT WAS EITHER CONTRARY TO PAYTON OR IN SUCH A STATE OF CONFUSION DID THE PANEL BELOW ENTIRELY DISREGARD THE OPINION IN U.S. v. CONGOTE, 656 F.2d 971 (5th Cir. 1978) WHICH SPECIFICALLY HELD THAT PRIOR TO PAYTON THE LAW IN THE FIFTH CIRCUIT WAS THAT ABSENT EXIGENT CIRCUMSTANCE, FEDERAL AGENTS NEEDED AN ARREST WARRANT TO ARREST A PERSON IN HIS OWN HOME?

III. ABSENT EXIGENT CIRCUMSTANCES DO FEDERAL DRUG ENFORCEMENT AGENTS HAVE THE RIGHT TO ENTER A PERSON'S DWELLING FOR THE PURPOSE OF ARRESTING HIM WITHOUT AN ARREST WARRANT?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF PRIOR PROCEEDINGS AND DISPOSITION	1
STATEMENT ON JURISDICTION	5
CONSTITUTIONAL PROVISIONS	6
STATEMENT OF THE CASE AND FACTS	7
REASONS FOR GRANTING THE WRIT	12
I. DOES THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICT WITH THIS COURT'S RECENT RULING IN PAYTON v. NEW YORK, 445 U.S. 573 (1980) AND WITH U.S. V. JOHNSON, ___ U.S. ____, ___ S.Ct. ___, ___ L.Ed.2d ___, Case No.: 80-1608 (June 21, 1982)?	12

Page

II. IN DECIDING THAT PRE-PAYTON LAW IN THE FIFTH CIRCUIT WAS EITHER CONTRARY TO PAYTON OR IN SUCH A STATE OF CONFUSION DID THE PANEL BELOW ENTIRELY DISREGARD THE OPINION IN U.S. v. CONGOTE, 656 F.2d 971 (5th Cir. 1978) WHICH SPECIFICALLY HELD THAT PRIOR TO PAYTON THE LAW IN THE FIFTH CIRCUIT WAS THAT ABSENT EXIGENT CIRCUMSTANCE, FEDERAL AGENTS NEEDED AN ARREST WARRANT TO ARREST A PERSON IN HIS OWN HOME? 16

III. ABSENT EXIGENT CIRCUMSTANCES DO FEDERAL DRUG ENFORCEMENT AGENTS HAVE THE RIGHT TO ENTER A PERSON'S DWELLING FOR THE PURPOSE OF ARRESTING HIM WITHOUT AN ARREST WARRANT? 23

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	Page
Payton v. New York, 445 U.S. 573 (1980)	1, 2, 12, 14, 16-20, 23-25, 28
United States v. Congote, 656 F.2d 971 (5th Cir. 1981)	3, 13, 16-19 22, 27
United States v. Gaultney, 381 F.2d 1137 (5th Cir. 1978)	16, 20, 22
United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977)	21
United States v. James, 528 F.2d 999 (5th Cir. 1976)	21
United States v. Johnson, ___ U.S. ___, ___ S.Ct. ___ ___ L.Ed.2d ___ Case No.: 80-1608 (June 21, 1982)	14, 17, 24 28
United States v. Juarez, 603 F.2d 267 (5th Cir. 1978)	21

Cases	Page
United States v. Llinas, 603 F.2d 506 (5th Cir. 1979)	21, 22
United States v. Marszalkowski, 669 F.2d 665 (11th Cir. 1982)	3

OTHER AUTHORITIES

28 U.S.C. §1254(1)	5
U.S. CONST., 4 Amend	6
Federal Rules of Criminal Procedure, Rule 41(c)(2)(a)	26

STATEMENT OF PRIOR PROCEEDINGS AND DISPOSITION

This Petition for writ of Certiorari arises out of an order by the Trial Judge granting Petitioner Brock's Motion to Suppress in part and denying the Motion to Suppress in part. (TT. 108, 109.) A notice of appeal from this order was filed by the Government on July 31, 1980 (R. 127.) On appeal, the Eleventh Circuit panel reversed. In an opinion by Fay, Circuit Judge, joined by Roney, Circuit Judge and Edenfield, District Judge, the Court held inter alia, that 1) the rule of Payton v. New York, 445 U.S. 573 (1980), holding unconstitutional warrantless entries into private dwellings absent exigent circumstances was not the law in the Fifth Circuit

prior to Payton as it was in most circuits, and 2) assuming arguendo that exigent circumstances were needed to justify the search, such circumstances were present in this case notwithstanding the Trial Judge's factual determination to the contrary.

The trial below was based on a six count indictment filed in the United States District Court for the Southern District of Florida charging Petitioner Jack Brock with conspiracy to distribute cocaine, possession with intent to distribute cocaine, and use of a communications facility in the commission of a felony. (R. 1.) Jack Brock and co-Defendant Elaine Marszalkowski filed a Motion to Suppress and Memorandum of Law in Support of Motion to Suppress. (R. 40-41.) Jack Brock also filed a Motion for Severance and a Memorandum of

Law in Support of Motion for Severance. (R. 53-54.) A hearing on the Motion to Suppress was heard by the magistrate over a five-day period (T. 1-647) after which the magistrate recommended denial (RI. 59-71.) Co-Defendant Jorge Congote was severed for trial and was tried and convicted February 12-15, 1980. He was sentenced on March 27, 1980 and his conviction was affirmed by the Eleventh Circuit on September 21, 1978. United States v. Congote, 656 F.2d 971 (5th Cir. 1981).

During the middle of the trial, the lower court granted the Motion to Suppress in part and denied it in part. (TT. 108-109.) Jack Brock was later severed out of the trial. (TT. 194.) The Government appealed and the panel reversed. United States v. Marszalkowski, 669 F.2d 665 (11th Cir. 1982).

Parties will be designated as follows:

The Petitioner will be referred to as "Jack Brock," "Mr. Brock," or "the Petitioner."

The Government will be referred to as "Respondent" or "Government."

References to the trial transcript will be made by use of the symbol "TT." References to the suppression hearing will be made with the symbol "T." References to the record will be made by the symbol "R" as indicated by the index prepared by the clerk. References to the additional material prepared by the Petitioner and made part of the record excerpts will be referred to by the symbol "RI" utilizing the pagination of the Petitioner.

STATEMENT ON JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on March 1, 1982. A timely joint suggestion of en banc consideration and Petition for Rehearing was denied on May 14, 1982, and this petition for certiorari was filed within 60 days of that time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., 4 Amend.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE AND FACTS

On November 7, 1979, DEA agents, Charley Brown, Jr. and Agent Thompson, acting in an undercover capacity, went accompanied by an informant to defendant Loran Bennett's place of business. (TT. 50.) Agent Brown told Bennett that he wanted to buy large quantities of cocaine. Bennett replied that he had a supply of cocaine. (TT. 52.) Agent Thompson asked Bennett if Bennett could supply him with four to five kilograms of cocaine per month and Bennett replied that he could. (TT. 52.)

On November 8, 1979 the cocaine transaction was consummated by these individuals. Agent Brown met Mr. Bennett and another individual, later identified as defendant Stanford Mitchell, at a Ramada Inn, at which time the cocaine

was exchanged. (TT. 61-62.) Bennett and Mitchell were arrested at this time and then taken to the Drug Enforcement Administration Office. (TT. 65-66.) The arrest took place at approximately 9:30 p.m. (TT. 61.)

Bennett agreed to make a telephone call later that evening to his alleged source, later identified as Mr. Jack Brock. Prior to Bennett's phone call, the DEA had already dispatched two units to "sit on" the apartment which Bennett had identified as Brock's. (T. 163, TT. 81.) During the telephone conversation, the voice identified as Brock stated that he could have "three more tomorrow." (T. 31.) Mr. Brock did not say that he had cocaine at the apartment, nor was there any indication that any cocaine was in the apartment. (T. 32.) In addition, there was nothing in the

conversation to indicate that anyone else involved in the transaction was present in the apartment that evening. (T. 32.)

After the telephone conversation, agents Brown, Thompson and Perry accompanied Mr. Bennett to an area in Hialeah. (TT. 85.) Bennett had given them directions and pointed out the apartment he described as Brock's. (TT. 85.) The agent had previously sought and received authority from the Assistant United States Attorney to make an arrest of Mr. Brock. (T. 34.) The agents went to the apartment for the purpose of arresting Mr. Brock and not to effectuate a search. (T. 36, 311.) Agent Brown testified that he did not know who the lessee of this apartment was. (T. 37.) Agent Brown further stated that he had no reason to believe

that Brock knew the agents were coming that evening. (T. 36.) Agent Perry stated that he did not know anything about Brock and specifically did not know if Brock was a dangerous or violent man. (T. 321.) The agents had no information as to what was on the premises and no information as to the presence or absence of other persons involved in the transaction. (T. 322.)

The agents knocked on the front door and fell into the kitchen when Mr. Brock opened the door. (TT. 89; T. 337-338.) After Brock identified himself, he was arrested by the federal agents. (T. 316.) After entering the apartment the agents found some white powder, a cutting instrument and some currency. (T. 290-370.) Subsequent to Brock's arrest, the agents searched the apartment and

found other items including a scale and additional white powder. (T. 367-371.)

After arresting Mr. Brock and defendant Marszalkowski, the agents secured the apartment and proceeded to procure a search warrant. (T. 327, 374.) Agent Brown personally returned to the apartment the next day with a search warrant. (T. 41.) At that time additional cocaine, weapons, currency and paraphernelia were found in various rooms and locations in the apartment. (T. 329.)

REASONS FOR GRANTING THE WRIT

I. DOES THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICT WITH THIS COURT'S RECENT RULING IN PAYTON v. NEW YORK, 445 U.S. 573 (1980) AND WITH U.S. V. JOHNSON, ___ U.S. ___, ____ S.Ct. _____, _____ L.Ed.2d ____, Case No.: 80-1608 (June 21, 1982)?

This case raises the basic principles involved in the constitutionality of warrantless arrests in private dwellings. At the time this Court decided Payton v. New York, 445 U.S. 573 (1980), only seven United States Courts of Appeals had expressed an opinion on this issue with only five of those Courts

having ruled such arrests unconstitutional.

This Court further footnoted the ostensible lack of a clear expression on the point which existed in the Fifth Circuit. The Fifth Circuit subsequently clarified its position in U.S. v Congote, 656 F.2d 971 (5th Cir. 1981), as being in conformity with Payton.

The panel below incorrectly viewed Payton as "a new constitutional rule" and refused to apply it to the instant case. The panel asserted that Payton represented neither prior federal law nor prior Eleventh Circuit law (utilizing Fifth Circuit precedent as its own).

The panel's decision in this confusing area of law squarely and irreconcilably conflicts with the decision in Congote, supra, and its own forerunners as well as with decisions of this Court

in Payton and U.S. v. Johnson, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, Case No. 80-1608 (June 21, 1982)

The panel in the decision below incorrectly held the Payton rule to be a novel constitutional standard and refused to apply it under the rubric of retroacticity. The court below discussed at length the impropriety of applying Payton retroactively, but that decision was clearly erroneous. This Court specifically held in Johnson, supra, that Payton should be applied retroactively to all convictions not yet final at the time the decision was rendered. This is such a case. The trial court in this case held that Payton should apply and ordered the evidence suppressed. The Eleventh Circuit improperly reversed that decision.

The decision below, representing the view of the Eleventh Circuit Court of Appeals, directly clashes on point with the decisions of this Court. The need for this Court's guidance merits a grant of certiorari to review and revise the judgment below.

II. IN DECIDING THAT PRE-PAYTON LAW IN THE FIFTH CIRCUIT WAS EITHER CONTRARY TO PAYTON OR IN SUCH A STATE OF CONFUSION DID THE PANEL BELOW ENTIRELY DISREGARD THE OPINION IN U.S. v. CONGOTE, 656 F.2d 971 (5th Cir. 1978) WHICH SPECIFICALLY HELD THAT PRIOR TO PAYTON THE LAW IN THE FIFTH CIRCUIT WAS THAT ABSENT EXIGENT CIRCUMSTANCE, FEDERAL AGENTS NEEDED AN ARREST WARRANT TO ARREST A PERSON IN HIS OWN HOME?

The judgment of the panel below is in direct and irreconcilable conflict with the precedent of the Eleventh Circuit found in United States v. Congote, 656 F.2d 971 (11th Cir. 1981), and United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978). Specifically, the panel's decision clashes with the above cases insofar as it holds that, prior to Payton v. New York, 445 U.S. 573 (1980), the Eleventh Circuit allowed warrantless

entry by government agents into private dwellings absent exigent circumstances. It now further clashes with the decision of this Court in Johnson, supra, which held that Payton should be applied retroactively to cases not final at the time of the Payton decision.

The conflict is especially apparent between the instant case and that of Congote, cases which both arise out of the same factual situation, and in fact, the same warrantless entry. Yet, the Eleventh Circuit announced diametrically opposite principles of law. In Congote, the Court initially found the warrantless entry to be a violation of Mr. Brock's Fourth Amendment rights but that Congote, a severed co-defendant, had no standing to assert that violation. The

Court curtailed the import of that decision by the subsequent insertion of footnote 6 which stated that any violations of Mr. Brock's rights were "merely assumptions," not to be construed as binding on Mr. Brock's appeal.

However, the subsequent correction of the Congote decision as to factual assumptions the Court made had no effect on the Court's application of pre-Payton precedent to that case. The Court stated:

> The application of Payton to the instant case [Congote] is not the retroactive application of a new rule. Indeed, in Payton the Court emphasized that it was simply clarifying what was already the law in most circuits.

656 F.2d at 974 n. 3 (Emphasis supplied)(citations omitted). This expression of what the Circuit's precedent was

prior to Payton directly contradicts what the panel in the case below believed pre-Payton law was when it stated:

> We therefore reject the trial judge's conclusion that Payton represented no more than a rearticulation of what already was established law in this circuit.

669 F.2d at 664 (Emphasis added).

The conflict is clear, direct and unequivocal. The panel opinion totally ignored the fact that in a previous decision, i.e. Congote, supra, it had precisely and unequivocally held that the law in the Eleventh Circuit was in conformity with the Payton decision. The panel instead resorted to attempted showings of confusion in the law, and incorrect applications of retroactivity. But, as Congote clearly announced, the law in the Fifth Circuit (and

therefore binding on the Eleventh) was and had been what Payton announced it to be.

The most recent and most comprehensive decision of the Eleventh Circuit regarding warrantless entries into private homes, prior to Payton, is United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978). In that well-reasoned opinion the Gaultney court opined:

> [I]t seems clear to us that, most assuredly, the Supreme Court [in Warden v. Hayden, 387 U.S. 294 (1967)] was saying that officers do not always have to have a warrant to enter a house for the arrest of a felon. If they have probable cause to arrest for a felony and the exigencies of the situation make it imperative that they proceed without waiting to obtain a warrant the arrest is not constitutionally invalid. This is certainly the law as it exists in the Fifth Circuit.

Id. at 1146 (Emphasis added).

Another demonstrably clear violation of well-settled precedent in the Eleventh Circuit is the panel's substitution of its own finding of fact for those of the trial court. On review of a motion to suppress, the appellate court must accept the trial court's finding of fact unless they are clearly erroneous. United States v. Llinas, 603 F.2d 506 (5th Cir. 1979); United States v. Juarez, 603 F.2d 267 (5th Cir. 1978); See also United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977); United States v. James, 528 F.2d 999 (5th Cir. 1976). No such determination was made by the panel. Yet it assumed facts not found in the record and substituted its own finding of exigent circumstances even though the trial court found to the contrary. (TT 108.) This is done even though under the panel's holding no such

circumstances need be shown to justify the entry and, perhaps, in recognition of just how unsturdy that holding is.

As illustrated, the panel's decision is blantantly irreconcilable with the decisions of Congote, Gaultney, and Llinas. To allow such a conflict to continue can do only violence to stare decises and interrupts the logical flow of precedent on this point. Accordingly, certiorari must be granted to resolve this conflict through review of the panel's decision below.

III. ABSENT EXIGENT CIRCUMSTANCES DO FEDERAL DRUG ENFORCEMENT AGENTS HAVE THE RIGHT TO ENTER A PERSON'S DWELLING FOR THE PURPOSE OF ARRESTING HIM WITHOUT AN ARREST WARRANT?

The principles and proper application of Fourth Amendment law were clearly not applied by the panel in the decision below. Instead, the judgment blatantly differs with general Supreme Court authority. Moreover, it specifically and squarely clashes with Payton. The judgment below suggests, perhaps, that Payton is but a swift swing of the pendulum and does not require strict adherence.

> This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries, finds little or no support in common law or in the text and history of the Fourth Amendment. . . .

> Today's decision virtually ignores these centuries of common-law development and distorts the historical meaning of the Fourth Amendment. . . .

Payton, at 603, 604 (White, J. dissenting).

It would seem apparent that Payton law should have been applied to the instant case. The trial judge did apply Payton standards to Mr. Brock's motion to suppress and consequently found that the DEA agents had illegally entered and arrested Mr. Brock. The panel below subsequently reversed the trial judge's application of Payton's standard in ruling on the defendant's motion to suppress. As discussed in the previous section, retroactive application of law is now the issue at hand in the instant case. Johnson, supra.

At stake is the subtle erosion of Payton's import. Payton involved two

daytime, "routine felony arrests," arrests of a suspected murderer and of a suspected armed robber. Contrasted with this is Mr. Brock who, unlike these two routine felons, was arrested at night and, moreover, was not known by the arresting agents to be a violent or dangerous man (T. 321.)

Furthermore, Payton invalidated statutory authority for police activity. Such authority quite obviously holds more weight than the supposed "good faith" reliance attributed to the DEA agents by the panel. Certainly the panel cannot be referring to good faith reliance of the Federl Rules of Criminal Procedure which should have governed the arrest process in the instant case.

> If the circumstances make it reasonable to dispense with a written affidavit, a federal magistrate may issue a warrant based upon sworn oral testimony

> communicated by telephone or other appropriate means.

FED.R.CRIM.P. 41 (c)(2)(a). This rule was amended in 1977 to encourage the use of warrants and to make it administratively feasible to obtain one when quickly needed.

Assuming arguendo that time was a factor in the case at hand, a phone call to a federal magistrate still could easily have been placed immediately after agent Brown's conversation with Assistant U.S. Attorney Donald Graham who, while advising Brown to arrest Mr. Brock, did not suggest Brown procure an arrest warrant (T. 34); or during the drive to the apartment complex, where the agents went for the sole purpose of arresting Mr. Brock and not for the purpose of effecting a search (T. 36, 311);

or, finally, upon arrival at the apartment complex, where two units had previously been dispatched to "sit on" the apartment. (T. 163, TT. 81) Moreover, the trial judge found that exigent circumstances were not present and a quick arrest not necessary. The Congote Court assumed the same finding of fact. Agent Brown stated that he had no reason to believe that Jack Brock knew agents were coming that evening. (T. 36.) Indeed, the record is replete with testimony that vitiates any exigent circumstances under any standard.

No circumstances present in the record would excuse the necessity of securing a warrant. Yet, the panel is willing to excuse the improper behavior of the DEA agents in the present case. In so doing the panel has refused to apply Fourth Amendment principles to a

fact pattern of which such application has been mandated by this Court. Therefore, the decision below irreconcilably conflicts with Payton and Johnson and, consequently, erodes the import of its legal principles.

The panel below has thus departed from the accepted and usual course of judicial proceedings as to compel a petition for certiorari to review its decision.

CONCLUSION

For the foregoing reasons, it is urged that the Court accept jurisdiction of this cause and grant the Petition for Writ of Certiorari.

FINE JACOBSON BLOCK KLEIN
COLAN & SIMON, P.A.
Attorneys for Petitioner
Jack Brock
2401 Douglas Road
P.O. Box 340800
Miami, Florida 33134
(305) 446-2200

THEODORE KLEIN

By: _____
THEODORE KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Writ for Certiorari was mailed this 9th day of ~~June,~~ July 1982, to: United States Solicitor General, Washington, D.C.

By: THEODORE KLEIN
THEODORE KLEIN

82-59

Office - Supreme Court, U.S.
FILED
JUL 11 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

JACK BROCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

THEODORE KLEIN
FINE JACOBSON BLOCK KLEIN
COLAN & SIMON, P.A.
Attorneys for Petitioner
JACK BROCK
2401 Douglas Road
P.O. Box 340800
Miami, Florida 33134
(305) 446-2200

TABLE OF CONTENTS

Appendix		Page
1.	Opinion of the Eleventh Circuit Court of Appeals in U.S. v. Brock	1
2.	Order denying Petition For Rehearing	46
3.	Trial Exerpt of Court's Finding on Applicability Payton v. New York and lack of exigent circumstances.	48

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joanne MARSZALKOWSKI and Loran Bennett, Defendants-Appellants.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Jack BROCK, Defendant-Appellee.

Nos. 80-5597, 80-5621

United States Court of Appeals,
Eleventh Circuit.

March 1, 1982.

Appeals from the United States District Court for the Southern District of Florida.

Before RONEY and FAY, Circuit Judges, and EDENFIELD*, District Judge

FAY, Circuit Judge:

This opinion resolves two separate appeals involving a single group of defendants. In November of 1979, an undercover operation undertaken by the Drug Enforcement Administration

[DEA] led to the arrests of five individuals, Loran Bennett, Stanford Mitchell, Jack Brock, Joanne Marszalkowski and Jorge Congote, on drug related charges. Brock, who obtained a severance from his four co-defendants, convinced the trial judge that his arrest was illegal. The government presently appeals this ruling, along with the trial judge's concomitant suppression of evidence found in the initial search following the arrest. Our examination of the law prevailing in this circuit at the time of the incident in question leads us to reject the trial judge's assessment. We therefore find for the appellant, the United States of America, holding that evidence obtained during the initial search should not have been excluded.

In their separate appeal, convicted co-defendants Bennett and Marszalkowski present a laundry list of grounds for reversal. Neither, alas, has succeeded in cleansing on appeal what was found to be simply dirty linen at trial. We therefore affirm their convictions. Through the analysis that follows, we hope to iron out the legal creases in their argument. Here, first, are the steamy facts:

I.

On November 6, 1979, Alfred Moscowitz, a government informant, disclosed to DEA agents that Loran Bennett was known to him as a trafficker in "large quantities of cocaine." R. Vol. VIII at 128. At the agents' request, Moscowitz phoned Bennett and told him that he was in contact with prospective purchasers of cocaine. The

following day, Moscowitz escorted DEA Agents Brown and Thompson to Bennett's place of business in Hialeah. Posing as traffickers in narcotics, the agents told Bennett they wished to buy "large quantities of cocaine." Bennett disclosed that he had an unlimited supply, available at a price of $54,000.00 per kilo.[1] He assured the agents that he could supply them with four to five kilos monthly. He agreed to deliver one kilo the following day, and three additional kilos shortly thereafter. Bennett stated that "he and his people" had previously dealt in rock cocaine but had begun dealing in flaked cocaine, a purer form of the drug, which he found to be a "better commodity."

---

[1] A kilo is equivalent to approximately 2.2 pounds. R. Vol. VIII at 52.

The cocaine, he informed them, would be packaged in the shape of a football.

On November 8, the parties exchanged four telephone calls, during which Bennett disclosed that he had been successful in making contact with "his people." A major portion of the last telphone conversation, which occurred at 8:30 p.m. that day, was tape recorded; in it, Bennett assured the agents that all was ready as planned. Final arrangements were made to meet Bennett at the Ramada Inn, located at Milam Dairy Road and 72nd Avenue in Miami, for the delivery.

At 9:30 p.m., Bennett was observed driving his station wagon into the Ramada Inn parking lot accompanied by an individual later identified as Stanford Mitchell. Bennett parked the car, exited it and approached Agents

Brown and Thompson, who were standing near the front entrance of the motel. After escorting Bennett to their car, the agents showed him $58,000.00 in cash. The three men returned to Bennett's vehicle; Mitchell remained in the front seat. Bennett reached into the station wagon and retrieved a brown paper bag from a box on the car's back seat. Inside the paper bag was a football-shaped package, wrapped in masking tape. It contained a white powder determined subsequently to contain 984 grams of 48% pure cocaine. As the four men walked back to the agent's car, Brown and Thompson identified themselves. They immediately arrested Bennett and Mitchell. Bennett was found to have an automatic pistol with a holster and slip, together with rounds of ammunition in the waistband of

his trousers; Mitchell was carrying a revolver. In addition, Bennett had $1500.00 in his pocket which he stated his supplier had given him to use to find girls and to bring them back to the supplier's apartment for a party that night.

Bennett and Mitchell were then taken to the DEA office in Miami, where Bennett agreed to call his source of supply, whom he identified as Jack Brock. During their conversation, Bennett assured Brock that all had gone well "on the first one" and that the customers were ready for "three more tomorrow." Brock said that he would try to obtain the additional three kilos of cocaine. He asked Bennett to keep the buyers in town and to come over to Brock's apartment for the party. After the phone call, Bennett led the agents

to the area of an apartment in Hileah where Brock had delivered cocaine to him. He pointed out the apartment, from the outside, provided a physical description of Brock, and disclosed that a woman had been present in the apartment at the time Bennett received the drugs there. DEA agents were dispatched to maintain surveillance of the apartment. They observed two men entering and leaving the apartment carrying bags. After agents knocked at the apartment's front entrance, Brock responded, unexpectedly, by opening the kitchen door. As Brock stuck his head and torso out of the apartment, Agent Walde, who had been leaning against the kitchen entrance, fell in. The other agents followed him inside and revealed their identities. Having concluded that he fit Bennett's description of his

supplier, they asked Brock to identify himself. He complied and was arrested at once. From the kitchen, the agents were able to observe resting on a coffee table in the living room area the residue of a white powder; a mirror on which was a formula for cocaine; various cutting instruments; and cash. Joanne Marszalkowski, who was found standing in the kitchen or hallway area, was immediately arrested. A protective sweep was then conducted to look for other persons, as a result of which a handgun; scale; vial of cocaine; and a plastic bag containing white powder were found in plain view. Two agents remained inside to secure the apartment, while the others left to procure a search warrant. A search warrant was obtained and executed fifteen hours later; the latter search yielded

additional cocaine, methaqualone tablets and $10,500.00 in cash from a tall dresser in the bedroom containing women's clothing; a substance used to cut cocaine; and a .38 Smith & Wesson revolver along with additional cocaine from a nighttable next to the bed.

In June of 1980, a grand jury returned a six-count indictment charging Bennett, Mitchell, Brock, Marszalkowski and Congote with conspiracy to distribute cocaine (Count I); Bennett and Mitchell with possession of cocaine (Count II); Brock and Marszalkowski with distribution of cocaine (Count III) as well as with possession with intent to distribute cocaine and methaqualone tables (Count IV); and Bennett and Brock with use of a communication facility to further a felony (Counts V and VI). Congote was severed and convicted; his

conviction was affirmed in United States v. Congote, 656 F.2d 971 (5th Cir. 1981). Bennett's motion for severance was denied; he presently appeals the denial. During trial, the judge granted Brock's motion for severance as well as Marszalkowski's and Brock's motion to suppress evidence obtained following the initial entry of the apartment; however, he denied suppression of those items found during the subsequent search conducted pursuant to warrant. Mistrials were declared as to all counts against Mitchell and the conspiracy charge against Marszalkowski, after the jury was unable to reach verdicts regarding them.

II. Bennett's Challenge

A. Severance

Bennett complains that he was

misjoined with his co-indictees on dual grounds: first, the charge of conspiracy in Count One was multiplicitous and second, once the conspiracy charges against Mitchell and Marszalkowski were dismissed, his severance was mandatory.

[1] Federal Rule of Criminal Procedure 8(b) permits joinder of defendants in a single indictment where they are alleged to have participated in the same transaction or series of

transactions.[2] For purposes of appellate review, the facts recited in an indictment are deemed true unless joinder is based on prosecutorial bad faith or improper legal interpretation. See United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977); United States v. Nims, 524 F.2d 123, 126 (5th Cir.), cert. denied, 426 U.S. 934, 96 S.Ct. 2646, 49 L.Ed. 2d 385 (1976).

While making no allegation of bad faith, Bennett does contend that the

---

[2]The complete text of Fed.R.Cr.P. 8(b) is as follows:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

indictment improperly charged multiple conspiracies. Bennett likens his indictment to that in United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976), where the lone facts that the co-defendants Whitehead and Meredith lived in the same building and sold cocaine to the same buyer were insufficient grounds to support their joint indictment for distribution of the controlled substance. Although the two drug deals in Whitehead possessed the "common denominator" of defendant Jackson, who bought drugs from Whitehead in one deal and from Jackson in another, id. at 1025, no conspiracy was charged nor was any relationship whatsoever between Jackson and Meredith ever alleged. 539 F.2d at 1024, n.1. Under those circumstances, their separate, unrelated sales of cocaine could not

possibly have formed part of the same transaction or series of transactions. Joinder, therefore, was impermissible, "[s]ince the alleged criminal acts of Whitehead and Meredith were independent crimes, engaged in separately, without concert of purpose." 539 F.2d at 1023.

[2,3] By contrast, evidence of Bennett's participation in a conspiracy reflects a common scheme supporting joinder. Bennett nevertheless protests that when he purchased cocaine from Brock at the apartment rented by Marzalkowski, the latter remained in the kitchen and that therefore, if anything, multiple unrelated conspiracies existed. A single conspiracy, however, may exist even if not all conspirators take part in all aspects of the scheme. See United States v. Ochoa, 609 F.2d 198, 202 (5th Cir. 1980); United States

v. Alvarez, 625 F.2d 1196, 1198 (5th Cir. 1980)(en banc), cert. denied, ____ U.S. ____, 101 S.Ct. 2017, 68 L.Ed. 2d 324 (1981). Certainly the introduction of evidence including Marszalkowski's presence in the apartment at the time Bennett purchased cocaine there from Brock; the rental of the apartment in her name; and the presence of drugs in what clearly was her dresser, by virtue of its containing women's clothing, provide the requisite connection between herself and Bennett. Accordingly, we find no merit in the appellant's claim of misjoinder on the ground of multiple conspiracies.

[4,5] Moreover, the mere fact that a mistrial on the conspiracy charge was declared as to Marszalkowski does not detract from the legal adequacy of the conspiracy count. The general rule

is that even acquittal of conspiracy does not of itself establish misjoinder. Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed. 2d 921 (1960); Cacy v. United States, 298 F.2d 227, 228-29 (9th Cir. 1961). Bennett's second claim, then, of retroactive misjoinder, which asserts that the dismissal of the conspiracy charge against Marszalkowski requires a finding of misjoinder, is similarly misplaced.

Bennett further contests the trial judge's denial of his motion for severance of his trial from co-defendant Marszalkowski on the grounds that the admission of certain evidence, consisting of narcotics, against Marszalkowski was prejudicial as to him.

[6-9] Our analysis of this claim must begin with the accepted

principle that defendants jointly indicted should be so tried. United States v. Sullivan, 578 F.2d 121, 123 (5th Cir. 1978). An exception to this rule may be enforced where such joinder would cause the defendant undue prejudice. F.R.Cr.P. 14.[3] In determining a motion for severance brought on such grounds, the trial judge is empowered to exercise sound discretion in balancing possible prejudice to the defendant against governmental concern for judicial

---

[3]Rule 14 of the Federal Rules of Criminal Procedure provides, in pertinent part, that:

> [i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever othe relief justice requires...

economy. United States v. Staller, 616 F.2d 1284, 1294 (5th Cir. 1980). Inherent in every joint trial is, of necessity, some degree of bias. Only in the event such prejudice appears to be compelling does severance become warranted. United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973).

[10] The following test for assessing the existence of "compelling prejudice" has been adopted by this circuit:

> '[w]hether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence

> that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.'

Tillman v. United States, 406 F.2d 930, 935 (5th Cir. 1969)(citing Peterson v. United States, 344 F.2d 419, 422 (5th Cir. 1965)). See also United States v. Zicree, 605 F.2d 1381, 1388-89 (5th Cir. 1979).

[11] Viewed according to the foregoing standard, the trial of Bennett with Marszalkowski was fully proper. Bennett's claim of prejudice is addressed solely to the introduction at his joint trial of evidence consisting of 38 methaqualone tablets and several vials of cocaine, which Marszalkowski had possessed in her apartment. We note, however, that on this evidence, the jury was unable to reach a verdict

regarding Marszalkowski's own involvement in a conspiracy; hence a mistrial was declared as to her on this count. Consequently, the court does not accept the appellants' unsubstantiated assertion that what was clearly not prejudicial even to the individual against whom it was introduced - Marszalkowski - could nevertheless have prejudiced Bennett.

Bennett argues additionally that the court erred in failing to caution the jury to consider those items only as against Marszalkowski. However, since it was Marszalkowski alone who was charged as to those particular items, jury confusion does not seem likely. Moreover, at the close of trial, the judge carefully instructed the jury to consider each offense and each defendant

separately.[4] We conclude that this explicit caution sufficed to cure any possible confusion or prejudice in the minds of the jurors. See United States v. Johnsto, 547 F.2d 282 (5th Cir. 1977); United States v. Davis, 546 F.2d 617, 520 (5th Cir. 1977).

B. Sufficiency of Evidence

Conspiracy

[12, 13] Bennett argues that declaration of mistrials as to Marszalkowski and Mitchell followed by

---

[4]The trial judge cautioned the jury by stating:

> Now, a separate crime or offense is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also the case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other defendant. R.Vol.X at 503.

the government's dismissal of their conspiracy indictment renders insufficient the evidence of his own participation in the alleged conspiracy. The crux of Bennett's claim is that once conspiracy charges against Marszalkowski and Mitchell were dismissed, no more than a single sales transaction was provable. He contends that the remaining evidence of a lone sale to him by Brock simply fails to support an inference of their joint conspiracy. Acknowledging that his co-defendant, Congote, was convicted of conspiracy at a separte trial, Bennett suggests, without foundation, that Congote's conviction related to a separate conspiracy. Bennett fails to recognize, however, the crucial principle that a declaration of mistrial is not equivalent to a factual determination. United States v. Nelson,

599 F.2d 714, 716 (5th Cir. 1980); United States v. Ballard, 586 F.2d 1060, 1064-66 (5th Cir. 1978). The only prerequisites to a proper finding of the defendant's guilt are proof beyond a reasonable doubt of the conspiracy's existence; Bennett's knowledge of it; and his agreement to become a member. United States v. Suarez, 608 F.2d 584, 586 (5th Cir. 1979). We find that the totality of evidence supplies each of these elements of guilt. Bennett's reference to having contacted "his people" in order to supply the agents with cocaine; his accurate description of the cocaine package as football-shaped; his agreement to distribute one kilo of cocaine initially, to be followed by three more; his phone call to Brock, in which he discussed the delivery of three additional kilos and in which Brock indicated his complete familiarity with

the proposed transaction, point to his and Brock's "concert of action, all working together with a single design to accomplish a common purpose," United States v. Villareal, 565 F.2d 932, 938 (5th Cir. 1978)--the distribution of cocaine for monetary gain. We therefore reject his assertion of insufficiency.

Facilitation

[14] Bennett launches a similar attack on the adequacy of the evidence supporting his conviction for use of a telephone to commit a felony. Since one phone call made by Bennett to Brock was initiated at the agents' behest, Bennett contends that it cannot form the basis for the facilitation count. This contention, while accurate, certainly is not dispositive, since it is not upon this particular phone call that the facilitation count is based.

Rather, the charge is founded on other phone calls with Agent Brown, see R.Vol. VIII at 57; Supp.R. at 152, and with Brock regarding the drug deal, to which Bennett himself testified at trial, see R.Vol. IX at 316-320. United States v. Arias, 639 F.2d 1183, 1185-6 (5th Cir. 1981).

Accordingly, we find meritless the appellant Bennett's challenge of his conviction for facilitation of a felony.

III. Marszalkowski's Appeal

Insufficiency of Evidence

[15] Joanne Marszalkowski likewise argues that insufficient evidence was presented to support the charge against her of possession with intent to distribute cocaine and methaqualone. She consequently claims reversible error in the trial judge's denial of her motion for a directed

verdict of acquittal. We disagree. Based on our evaluation of the evidence in a light most favorable to the government, see Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), we conclude that reasonable jurors could indeed have found the evidence inconsistent with every hypothesis of her innocence, United Stats v. Moore, 505 F.2d 620, 623 (5th Cir.), cert. denied, 421 U.S. 918, 95 S.Ct. 1581, 43 L.Ed.2d 785 (1975).

[16, 17] Possession of narcotics may be constructive or actual. United States v. Goldstein, 635 F.2d 356, 362 (5th Cir. 1981). A defendant's constructive possession of contraband may be established by circumstantial evidence of his or her ownership or control of the premises in which the contraband is hidden. United

States v. Moreno, 649 F.2d 309, 312 (5th Cir. 1981). The apartment in which the instant drugs were concealed was owned by Joanne's mother and rented in Joanne's name; the cocaine and methaqualone introduced against her were recovered from a tall dresser in her bedroom containing women's clothing and from the nighttable near her bed. These facts, which provide ample evidence of her dominion over the premises from which the contraband was recovered, fulfill the requisite element of constructive possession.

Furthermore, the high purity of the cocaine found in the tall dresser

and nighttable,[5] along with the recovery from her apartment of a substance used to cut cocaine, a large amount of cash ($10,500.00) and a weapon (.38 Smith & Wesson revolver concealed in the nighttable next to her bed) constitute surrounding circumstances from which Marszalkowski's intent to distribute is readily inferrable. United States v. Grayson, 625 F.2d 66 (5th Cir. 1980); United States v. Muckenthaler, 584 F.2d 240, 247 (8th Cir. 1978); United States v. Mather, 465 F.2d 1035 (5th Cir.), cert. denied, 409 U.S. 1085, 93 S.Ct. 685, 34 L.Ed.2d 672 (1972).

---

[5]Subsequent chemical analysis of the cocaine found in the bedroom pursuant to execution of the search warrant indicated that the 2.4 grams in the tall dresser, and the 25.3 grams and 10.5 grams in the nighttable next to the bed were, respectively, 86%, 84% and 85% pure. R.Vol. IX at 238-39, 247.

Validity of Search Warrant

[18] The appellant would, however, have the court delete from its consideration of the sufficiency of the evidence all items seized from her apartment, including those found during execution of the search warrant. While supporting the trial court's invalidation of the warrantless entry to arrest Brock, she challenges its failure to strike as unnecessarily tainted the evidence found in the later search conducted pursuant to a warrant. She contends that the probable cause supporting issuance of the warrant was based on observations made in the apartment immediately after the unlawful entry; hence, given the illegality of the initial entry, all that followed was "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct.

407, 9 L.Ed. 2d 441 (1963). We need not explore, however, the merits of Marszalkowski's argument, since we agree with the government's response as appellee in United States v. Marszalkowski, No.80-5597, and its identical argument as appellant in the separate appeal of United States v. Brock, No. 80-5621, that the agents' original entry comported fully with constitutional stricture.[6] United

---

[6]In the corrected opinion of United States v. Congote, 656 F.2d 971 (5th Cir. 1981), the fifth circuit affirmed the conviction of severed co-defendant Jorge Congote. In so doing, it explicitly left open the issue of the validity of the initial entry and search:

> The foregoing discussion of the asserted violations of the rights of Brock and Marszalkowski, upon which appellant claims standing to rely, are merely assumptions based upon the record in this case, including the magistrate's report. It is not to be construed as a definitive holding that their respective rights were in fact violated. Id. at 975, n.6

States v. Allen, 588 F.2d 1100, 1106 (5th Cir. 1980). We consider next our reasons for this conclusion.

IV. Government's Appeal from Order of Suppression

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980), represents the Supreme Court's most recent pronouncement regarding the elements necessary to support a warrantless entry to a suspect's home for arrest purposes. Payton holds that, absent exigent circumstances, probable cause by itself is insufficient to support a warrantless entry into a private residence for arrest. Although the facts of the instant case occurred nearly half a year prior to Payton, the trial judge applied Payton's standard in ruling on the defendants' motion to suppress.

[19,20] In our view, however, the established criteria for determining the retroactivity of a new constitutional rule, consisting of

> (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards

Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967), militate resoundingly against retroactive application of Payton. We note first that the purpose to be served by applying Payton retroactively is that of the exclusionary rule itself: deterrence of police activity violative of the fourth amendment. Since police could not have known of a future interpretaton of the fourth amendment's mandate at the time the instant facts occurred, no possible deterrence of

conduct in contravention of that future rule could ensue. United States v. Peltier, 422 U.S. 531, 542, 95 S.Ct. 2313, 2320, 45 L.Ed.2d 374 (1974); Michigan v. Tucker, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182 (1973). Indeed, police conduct in the instant situation reflected no less than justifiable, good faith reliance on what they reasonably believed to be the existing constitutional standard governing warrantless home arrests, recognized by the Supreme Court itself in Payton to be a "longstanding" nationwide practice. 445 U.S. at 598, 100 S.Ct. at 1386. Finally, the burden on the administration of justice were Payton to be applied retroacticely would be massive. Since the practice of

warrantless entry has been "widespread," id.,[7] clearly many convictions would be subject to reversal. Such reversal would be mandated despite the fact that the evidence suppressed would be highly probative. Indeed, the exclusion of reliable evidence seized prior to Payton would impair rather than enhance the pursuit of truth at trial. Stone v. Powell, 428 U.S. 465, 490-91, 96 S.Ct. 3037, 3050-3051, 49 L.Ed.2d 1067; United States v. Williams, 573 F.2d 348, 350 (5th Cir. 1978).

In recognition of precisely these concerns, the Supreme Court of the

---

[7]The Supreme Court in Payton noted that "a majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances." 445 U.S. at 598, 100 S.Ct. at 1386.

United States has refused to apply retroactively new standards established in analogous fourth amendment contexts:

> It is indisputable ... that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.

United States v. Peltier, 422 U.S. 531, 535, 95 S.Ct. 2313, 2316, 45 L.Ed.2d 374 (1975)(holding not retroactive the rule in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed. 2d 596 (1973), which requires probable cause to justify automobile searches conducted by roving border patrols). The Supreme Court has noted additionally that

> [i]f the purpose of the exclusionary rule to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

422 U.S. at 542, 95 S.Ct. at 2320. See also Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965),(holding not retroactive the rule of Mapp v. Ohio, 366 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 108 _____(1961), which mandates application of the fourth amendment's exclusionary rule to state criminal proceedings); United States v. Corcione, 592 F.2d 111, 118 (2d Cir. 1979).

In light of the above analysis, we hold that the balance of relevant considerations weighs heavily againt retroactive application of the Payton standard.

The trial judge further indicated that pre-existing fifth circuit law was identical to Payton in requiring both probable cause and exigent circumstances to justify warrantless home arrests; that, as the trial judge found, exigent circumstances were not present here; and that, therefore, the warrantless entry must be deemed illegal even if Payton were held not retroactive. Our review, however, reflects that prior fifth circuit law was far from such a model of clarity.

Indeed, the Supreme Court in Payton appeared to have interpreted fifth circuit law as not requiring exigent circumstances, when it specifically contrasted United States v. Williams, 573 F.2d 348 (5th Cir. 1978) with Payton-like decisions of other circuits. 445 U.S. at 575, n.4, 100

S.Ct. at 1374. United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978), decided four months after Williams, compounds the confusion. While asserting that a warrantless arrest of an individual at home grounded on probable cause and exigent circumstances would certainly be constitutional, it offers no insight as to whether such a combination is necessary to validate such an arrest:

> [I]t seems clear to us that, most assuredly, the Supreme Court [in Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 783 (1967)] was saying that officers do not always have to have a warrant to enter a house for the arrest of a felon. If they have probable cause to arrest for a felony and the exigencies of the situation make it imperative that they proceed without waiting to obtain a warrant the arrest is not constitutionally invalid. This is certainly the law as it exists in the Fifth Circuit.

581 F.2d at 1146. See also United States v. Savage, 564 F.2d 728, 733 (5th Cir. 1977) (upholding a warrantless search of motel room immediately following arrest based on probable cause alone), United States v. Hoffman, 488 F.2d 287 (5th Cir. 1974)(upholding warrantless entry and search of motel room on basis of probable cause alone); United States v. Wysocki, 457 F.2d 1155 (5th Cir.) cert. denied, 409 U.S. 859, 93 S.Ct. 145, 34 L.Ed.2d 105 (1972)(upholding warrantless arrest in motel room based on probable cause and exigent circumstances, without discussion of whether exigent circumstances necessary).

[21] We therefore reject the trial judge's conclusion that Payton represented no more than a re-articulation of what already was the established law in this circuit.

The court in Gaultney did find exigent circumstances in a situation closely analogous to the one at hand. One Francis Gilmere had offered to sell cocaine to undercover DEA agents. During police surveillance of the apartment from which Gilmere was observed carrying the drugs, three individuals were seen entering and departing. After Gilmere's arrest, police entered the apartment without a warrant and arrested three men found inside. A protective sweep was then conducted during which contraband was found in plain view. On these facts, the warrantless arrest and ensuing search were upheld:

> The officers had good reason to believe that as much as ten pounds of cocaine was in the house. They saw, too, that considerations of privacy ordinarily attributable to a home were present in only

> minimal form. Gilmere had visited the house and quickly left with a package which he had not carried there. A woman soon left. Two men drove up in another vehicle and entered. The place was a beehive of activity, involving a comparatively large number of people who did not appear to be members of the family group. The officers could reasonably infer that those within the house were momentarily expecting the return of Gilmere, with $20,000 from the intended transaction at the restaurant; his failure to return would likely raise flags for people immersed in so dangerous an activity as the cocaine traffic.

581 F.2d at 1147.

[22] Likewise, in the instant case, officers maintained surveillance of an apartment belonging to arrested co-conspirators Bennett's source. Having previously listened to a taped conversation between Bennett and his source, Brock, in which the latter had assured Bennett that he would obtain

more drugs later that night or the next morning for another deal, the police's observation, as in Gaultney, of two individuals entering and leaving the apartment carrying packages gave rise to their reasonable belief of ongoing criminal activity within. Moreover, given Brock's instruction that Bennett should return to the apartment that night, Bennett's failure to do so, like Gilmere's failure to show in Gaultney, would surely have aroused Brock's suspicion. These circumstances, coupled with the relative ease with which narcotics may be disposed of, clearly meet, if not surpass, the requisite level of exigency found in Gaultney. See also United States v. Tolliver, 665 F.2d 1005, 1007-1008 (11th Cir. 1982). As the fifth circuit noted in Gaultney, drug dealers are likely to be armed and

dangerous. 581 F.2d at 1147. We consequently find that police effectuating Brock's arrest possessed both the right and the obligation to secure the apartment by conducting a protective sweep. See United States v. Quigley, 631 F.2d 415, 418-19 (5th Cir. 1980); United States v. Bowdach, 561 F.2d 1160, 1168-69 (5th Cir. 1977). Hence, even assuming arguendo the accuracy of the appellee's interpretation of pre-Payton fifth circuit law, we find, finally, that exigent circumstances were present in the instant situation, and, on that basis, no justification existed for excluding the contraband found in plain view.

V.

Based on the foregoing, we herety AFFIRM the convictions of

co-defendants Marszalkowski and Bennett in the case of United States v. Marszalkowski, no. 80-5597. In the separate appeal of the United States in the case of United States v. Brock, no. 80-5621, we hereby REVERSE the trial judge's suppression of evidence obtained during the initial warrantless search of the apartment conducted subsequent to the arrests and REMAND that case for trial.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 80-5621

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JACK BROCK,

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 1, 11 Cir., 1982, __ F.2d __).

(May 14, 1982)

Before RONEY, FAY, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

*The Honorable Newell Edenfield, United States District Judge for the Northern District of Georgia, sitting by designation. This case is being decided by a quorum due to the death of Judge Edenfield on December 27, 1982, 28 U.S.C. Section 46(d).

5854A061782

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 80-1-CR-JWK

UNITED STATES OF AMERICA, Plaintiff, v. LORAN BENNETT STANFORD RAYE MITCHELL JACK BROCK JOANNE MARSZALKOWSKI, Defendants.	)	EXCERPT OF TRIAL

United States Courthouse
300 Northeast 1st Avenue
Miami, Florida
Monday, June 9, 1980

The above-entitled cause came on for trial before the Honorable JAMES W. KEHOE, United States District Judge, and a Jury, at the time and place aforesaid, pursuant to Notice.

- - - -

APPEARANCES

ALAN L. WEISBERG,
Assistant United States Attorney,
Attorney for the Government.

STEPHEN ROSEN, ESQ.,
Attorney for Loran Bennett.

STEPHEN LIPTON, ESQ.,
Attorney for Stanford Raye Mitchell.

TED KLEIN, ESQ.,
Attorney for Jack Brock.

TAM WILSON, ESQ.,
Attorney for Joanne Marszalkowski.

THE COURT: I will interrupt your argument. I know you have other matters you want to present to me on your motion. Go ahead.

MR. KLEIN: The basic thrust of my argument is the initial entry was illegal; based upon the recently decided case of Paten versus New York, which I do not have the exact citation, but I believe the Court is now familiar enough with it to know what it is that I am talking about.

THE COURT: Florida Supreme Court, 1371.

MR. KLEIN: This is not an exigency circumstance case. The fact I have pointed out that conversation totally contradicts the possibility of any exigencies.

THE COURT: What time of the night was it?

MR. KLEIN: About 11:30 at night, your Honor. There were no facts to indicate that the defendant was going to flee; that he was going to destroy evidence; that there were confederates at large in that particular apartment. That requires them to go and immediately search the premises.

All of the facts contradict that. The conversations that took place indicates there was no cocaine present; that there was nobody else present and that things had really settled down for the night, and that any activity that was going to take place was going to take place the following day.

Now, in that connection then that brings us to---

THE COURT: Let me stop you there, if I may, so we can at least have a proper record for the Fifth Circuit Court of Appeal. Bring to my attention the Magistrate's recommendations where he ever ruled that exigency circumstances did or did not take place.

I think you got off on a base that did not include exigency circumstances.

MR. KLEIN; I was merely anticipating the possibility.

THE COURT: Let me go over it a minute and see. Of course, in reading

your brief, I think you are inclined to think you do not have to show exigency circumstances.

MR. WEISBERG: Our position is, first, there were exigency circumstances.

THE COURT: No facts have been established for that.

MR. WEISBERG: We believe there are facts to support it.

THE COURT: Let me back you up a minute then. As I understood your brief, you interpreted Williams to mean that you did not need any exigency circumstances.

MR. WEISBERG: True.

THE COURT: There are several cases that seem to state that without Paten, the law in the Fifth Circuit has always been that you must have exigency circumstances before you can go in to make an arrest without a warrant. So, with or without Paten, in the Fifth Circuit, you cannot make an arrest in a home without exigency circumstances.

MR. WEISBERG: I do not agree with that.

THE COURT: What authority do you rely on so I can understand your position?

MR. WEISBERG: I rely on the Supreme Court.

THE COURT: That is pretty good authority. What case?

MR. WEISBERG: Paten.

THE COURT: Certainly Paten says you cannot go in without, and then they didn't get to exigency circumstances. They say the statute which permits you to do so is unconstitutional to the Fourteenth Amendment.

MR. WEISBERG: The fact it is new Law---

THE COURT: It may be in some circumstances, so I think what we have to really do is, and if I am analyzing it wrong, you all help me, here, but it appears to me that what we have is that

as pertains to the Fifth Circuit, that has always been the law, and they came back in in McGuire, 608 F.2d 1028, where they said:

> "It has been repeatedly held to be the law of this Circuit that where officers have probable cause to arrest for a felony the exigencies of the situation make it imperative that they proceed without waiting to obtain a warrant, the arrest is not constitutionally invalid."

I think Williams stands for the proposition interpreted by the Court; that in the Fifth Circuit, at the time of Paten, before and after, you must have a warrant unless or exigency circumstances.

MR. WEISBERG: I have no authority to the contrary except the Supreme Court.

THE COURT: Assume I will build on that hypothesis. It is my judgment that is the law in the Circuit and that is the law of the Circuit at that time.

My next question to you is: I do not recall that you ever were given an opportunity or made a contention that there were exigency circumstances.

MR. WEISBERG: At the time that I came into this case---

THE COURT: My question to you is: Do you want the opportunity to present to the Court some testimony

there were exigency circumstances?

MR. WEISBERG: Yes.

THE COURT: I am going to permit that.

MR. KLEIN: In referring to the testimony that has already been taken, we have 600 pages of testimony.

THE COURT: None of it involves exigency circumstances.

MR. KLEIN: That is because, in all humility, I vitiated each element of exigency circumstances through my cross examination of the various witnesses; when I asked them the specific questions to which I received an affirmative response; "Did you have any reason to believe that?"

THE COURT: I will consider the 600 pages. I am sure you were very intense in your examination. My point is: What is it you want me to consider?

MR. WEISBERG: The fact when they went to the apartment, they saw two men go in the apartment and two people come out; two men come out of the apartment with packages.

THE COURT: Maybe if counsel for the defendant has no objection, we would save an awful lot of time if you outlined the testimony you want and then we can get you all to concede that the testimony for this purpose is correct, so I want you to have an opportunity to show me what exigency circumstances existed at the time.

MR. WEISBERG: If I may have a moment, your Honor.

THE COURT: Would you want five or ten minutes because I know you are getting onto new ground?

MR. WEISBERG: Yes, I would.

THE COURT: We will take five, ten minutes. I will be back then.

[Thereupon a short recess was taken, after which the following proceedings were had:]

THE COURT: Counsel for the Government want to proffer to the Court what your testimony would be in addition to anything that is in that record that

we have gone over?

MR. WEISBERG: Your Honor, the record does make reference on Page 307 and 308 to the two men who were observed going into the apartment with brief cases. Now, recall the testimony earlier today; Mr. Bennett went into the apartment with the brief case and came out. These two men were going into the apartment with brief cases and coming out shortly thereafter.

THE COURT: That is in your affidavit for a search warrant?

MR. WEISBERG: I believe it is, your Honor. Furthermore, your Honor, the fact that the testimony was the call was made and they could not go through with the three kilos then does not mean

that it was not there available or there may not have been something less than that, and just because a suspect said something, there is no reason, I do not believe, for this Court to necessarily accept that on its face.

The fact remains the agents were told by Bennett, who was cooperating at the time, that he purchased it.

THE COURT: Counsel, I think maybe what we have to do is for you to educate me why I am getting off base. I do not think there is any question he had probable cause to arrest. I do not think either one of these two defendants; you did not have probable cause to arrest. All this seems to go to probable cause as distinguished from exigency circumstances.

MR. WEISBERG: I am trying to get to the exigency circumstances, and the most powerful information I have on that is the fact that when the house or the apartment was under surveillance, they saw people going there and coming out carrying suitcases or brief cases, which very easily could have been cocaine, and this could have been ongoing.

THE COURT: Which still seems to be a very beautiful dialogue for the ascertainment, procurement of a search warrant, but what does that have to do with exigency circumstances of why he could not be arrested than to go down and get a judicial officer to issue an arrest warrant?

MR. WEISBERG: The fact that a crime could have gone on, it could have continued. More people could have come there and it was necessary to do it at that time.

THE COURT: Do we have any legal authority of what exigency circumstances are?

MR. KLEIN: There has to be a reasonable belief that if the officers do not do something right now, that they are going to face the possibility that a suspect will escape. That evidence will be destroyed that something will happen, and that requires them to rush in and take immediate action.

We do not have any of those things here. What he has raised are

classic suspicions.

MR. WEISBERG: People were coming and going. The Government did not know if Brock would be there the next day. They did not know if it was his residence. Had they not made an arrest, he may not have been there the next morning.

THE COURT: If he had walked out of that house, it would not have been any problem, would there?

MR. WEISBERG: Which gets to the next issue of consent.

MR. WILSON: They have to prove he was going to be there the next day, because the transcript shows he fronted---

THE COURT: I have heard enough on this point. I do want to go back to my point; however, assuming you are correct in all this, that the initial entry into the home was, in fact, improper; however, they made a sweep which, it had been a proper entry, would have been admissible. It would appear to me, independent of all this, why is that affidavit not sufficient for the search warrant?

MR. KLEIN: Taking everything out---

THE COURT: Take all that out of the affidavit. There is still sufficient testimony in that affidavit to have issued the search warrant.

MR. KLEIN: Our motion is that taking all of that out of there, the affidavit, merely establishes that cocaine had been obtained from that apartment. It does not establish the fact that because there had been cocaine there, that there is a reasonable belief that there is more in there. The fact that something comes from there, you have to be able to show a classic affidavit for something like this, that the affiant says that he saw more cocaine in there, or that he was advised there was more cocaine.

Not only don't we have that; we have the exact opposite, a statement that the alleged source would have to wait until tomorrow. They never told that to the Magistrate, and I submit that if the agent had included that fact

in his affidavit, that it only would have contradicted probable cause, but the Magistrate would have said, "Under those circumstances, I can't give you any more, whatsoever."

THE COURT: Counsel, did you care for any oral argument?

MR. WILSON: No, your Honor. The thing is sufficiently handled already.

THE COURT: Anybody want any additional argument?

MR. WEINBERG: Just, your Honor, that I am advised some of these facts may have been brought to the attention of the Magistrate, although not contained in the affidavit.

THE COURT: It is the ruling of the Court that the Magistrate's recommendation insofar as his interpretation of Williams and the law in the Fifth Circuit and the applicability or inapplicability of Petan, will not be followed.

It is the ruling and judgment of this Court that the law in the Fifth Circuit on the date in question was and prior to Paten, the officers here did need to establish exigency circumstances prior to being able to make an arrest in a home.

I have assumed that the record reflects that this "home" was Brock's and the lady together.

MR. WILSON: At the time of the arrest.

THE COURT: It is the ruling of the Court exigency circumstances did not exist. I therefore am now going to grant the motion to suppress any of the evidence that was received by virtue of the sweep that took place immediately upon the arrest.

It would, therefore, follow that statement made at that time would also be suppressed. I am going to deny your motion to suppress the evidence which was obtained by virtue of the search warrant.

It is the judgment of the Court the affidavit for the search warrant, independently of the fact and acts

taking place outside the home and in the home, were sufficient to justify the issuance of the search warrant, and your motion to suppress those items will be denied.

It will be the burden of the Government to separate those items received on the sweep and those items received on the search. Thank you, gentlemen. 1:00 o'clock.

[Recess taken.]

MR. WEISBERG: I would ask the Court to reconsider its motion based upon the consent issued that the Court did not address itself to which was---

THE COURT: They fell on the door, I think is the way they described it.

MR. KLEIN: With their guns drawn.

THE COURT: If you recall something you want to refresh my memory as to being consent---

MR. WEISBERG: I have not been to the apartment, but they knocked on the door. I know from the transcript, once you fell into the door, you can see something in plain view. I am not sure the issue of whether you can see it---

THE COURT: Agent Brown, anything we say, don't you take it personally. I know you are doing your job and I am doing mine.

When you fall in the door, it

is difficult to have consent.

MR. WEISBERG: I am not certain it is critical he fell in the door. The man knocked on the door and he opened the door and the agent took a step in and then could see. I think that is consent.

THE COURT: All right, sir. Reconsideration on the grounds of consent was very thoroughly considered by the Court and denied. Do you want me to reconsider something?

MR. KLEIN: No. I do, but I won't bring it up now.

Your Honor, I would assume by virtue of the ruling, the entry and the arrest was illegal, that the presence of

the defendant, Jack Brock in the apartment, which was discovered as a result of the illegal entry, also then is suppressed because it is the Government's position that it is his mere presence in that apartment, which is an incriminatory fact connecting him to the possession of the items subsequently found pursuant to the search warrant, and consequently, if they went in there illegally and found him in there, in a manner that was illegal, then that fact, too, has to be suppressed.

THE COURT: I do not have any authority for that proposition. Do you have any on that particular vein?

MR. KLEIN: I can give you Wong Sun and the other cases that deal with the suppression of an illegal fruit.

THE COURT: I do not think that would be covered by Wong Sun.

MR. WEISBERG: Further, your Honor, even if they were not able to see anything in plain view from the time they knocked on the door, certainly the DEA agents could knock on anybody's door and a man can come and answer the door. Maybe from that point of view, before they fell into the door, they could not see anything, but certainly they saw him from the moment he opened the door.

MR. KLEIN: That is absurd, your Honor. That is a classic gaining entry by a roost; in other words, say we do not have probable cause or we do not have a search warrant, but let us see if we can get it by knocking on his door

and going up to it, leaning up against the door. If he answers it and we see him in there, then we have probable cause.

THE COURT: I think he can knock on the door if he had an opening of the door, without a falling in. That is falling in, and if the trier of facts does, in fact, believe that as he opened the door, he saw something, maybe you have that. I do not perceive that to be the fact.

MR. KLEIN: I also have several Fifth Circuit cases that deal with the question of the sufficiency of the affidavit for a search warrant to believe that some particular item is in the premises. I would like to cite that for the Court.

One is United States versus Flanagan, 423 F.2d 745, in which the Court specifically stated that an affidavit must have some basis of showing that the item, which is sought, is, in fact, in the premises, and I will quote from Page 747 where they go through the affidavit and then say, "The statement, even if reliable, that a named person who is a known felon has committed a burglary, plus possession by the suspect of some of the proceeds when arrested, does not without more authorize the issuance of a warrant to search the residence of the accused miles away."

That is what we have here, your Honor.

It is an affidavit that says the defendant obtained drugs from that premises, but it does not, in any way, even state that there is a reasonable belief that there is anything still on the premises.

The other case which I would like to cite is United States versus Character, appropriately named, Fifth Circuit, 1978, 568 F.2d 442, in which Judge Fay pointed out that the affidavit contained conclusionary statements that dealt with the question of whether or not there was anything on the premises to be searched, and also found that the affidavit misled the Magistrate and had the Magistrate known additional facts, that the affidavit for the search warrant would have been insufficient and the search warrant, therefore, would have been insufficient, and the Court

ruled that it should have been suppressed, which we maintain if the Magistrate had heard that telephone conversation in which Mr. Brock said, "I will try to get three more tomorrow," that there would have been absolutely no basis then upon which anyone could have believed reasonably there was anything at all inside the premises.

THE COURT: I understand your position. My ruling will remain the same.

MR. WILSON: I would join in that.

THE COURT: All right. That is as to both defendants, Brock and Marszalkowski.

* * * * * *

CERTIFICATE

STATE OF FLORIDA)
) SS.
COUNTY OF DADE)

I, PAUL C. HAFERLING, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 through 18, is a true and correct transcription of an excerpt of my stenographic notes of the proceedings before the Honorable JAMES W. KEHOE, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 15th day of August 1980.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to the Solicitor General of the United States, Department of Justice, Washington, D.C.

By: THEODORE KLEIN
THEODORE KLEIN

TABLE OF AUTHORITIES

Page

Cases:

Payton v. *New York*, 445 U.S. 573 ..... 3, 4

United States v. *Congote*, 656 F. 2d 971 2

United States v. *Johnson*, No. 80-1608 (June 21, 1982) 4

United States v. *Santana*, 427 U.S. 38 5

Warden v. *Hayden*, 387 U.S. 294 5

Constitution and statutes:

United States Constitution, Fourth Amendment 5

21 U.S.C. 841(a)(1) 1

21 U.S.C. 843(b) 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-59

JACK BROCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that evidence seized from his apartment should have been suppressed as the fruits of an unlawful arrest entry.

A six-count indictment returned in the United States District Court for the Southern District of Florida charged petitioner and four others with various violations of the federal narcotics laws. Specifically, petitioner was charged with conspiracy to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (Count I); possession of 525 grams of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count IV); and using a telephone to facilitate a narcotics felony, in violation of 21 U.S.C. 843(b) (Count VI). Prior to trial, petitioner moved to suppress evidence seized from his apartment following his arrest. An evidentiary hearing was conducted before a magistrate, who recommended that the suppression motion be denied.[1]

---

[1]The report and recommendation of the magistrate is attached hereto as an appendix.

Subsequently, the district court granted petitioner's motion in part and severed his case.[2] Pet. App. 69-70. The government appealed the suppression ruling, and the court of appeals reversed. *Id.* at 1-45.

1. The evidence adduced at the suppression hearing showed that on November 8, 1979, co-defendant Loran Bennett obtained one kilogram of cocaine from petitioner.[3] Later that evening, he sold the cocaine to two federal narcotics agents, who then placed him under arrest. The agents seized two loaded guns from Bennett and his bodyguard, co-defendant Stanford Mitchell, and two more guns from the co-defendants' car. Bennett then told the agents that he had obtained the cocaine from petitioner at an apartment in Hialeah and that petitioner was expecting him to return to the apartment later that evening to attend a party. He gave the agents a description of petitioner and the address of his apartment and advised the agents that a woman was with petitioner. At the agents' request, Bennett called petitioner in order to arrange for another purchase of cocaine. Petitioner agreed to attempt to obtain the additional drugs. The agents conducted surveillance at the apartment and saw two men carrying small bags that looked like attache cases enter and leave it at approximately 11:30 p.m.

---

[2]The evidence was suppressed only as to petitioner. Three of petitioner's co-defendants were tried together and convicted. The convictions of two of them were affirmed by the Eleventh Circuit in the same opinion in which it reversed the district court's order granting petitioner's motion to suppress. Pet. App. 1-45. A fourth co-defendant, Jorge Congote, was tried separately and was also convicted. The Fifth Circuit affirmed his conviction in a separate opinion. *United States* v. *Congote*, 656 F. 2d 971 (1981).

[3]The summary of evidence in text is taken primarily from the magistrate's report and recommendation, App., *infra*, 2a-8a. See also S. Tr. 6-12, 18-22, 28-30, 42, 163, 230, 237, 285-293, 329-330, 336-342, 366-375.

As soon as the visitors departed, the agents knocked on the front door, while another agent leaned against the nearby kitchen door. Petitioner opened the kitchen door and stuck his head and torso outside the apartment, causing the agent who had been leaning against the kitchen door to fall into the kitchen doorway. As they entered the kitchen the agents observed in plain view cocaine, paraphernalia, and a stack of cash. During a sweep search of the apartment the agents discovered co-defendant JoAnne Marszalkowski. Both she and petitioner were arrested. The agents removed a loaded revolver from the desk drawer near where they had seated Marszalkowski and seized another gun that they observed in plain view during the sweep search. At 3:00 p.m. the following day, the agents searched the premises pursuant to a warrant and seized additional evidence, including more cocaine, cash, and weapons.

2. The magistrate concluded that the arrest and ensuing seizures were lawful. He held first that no warrant was required because the entry preceded this Court's decision in *Payton* v. *New York*, 445 U.S. 573 (1980). App., *infra*, 10a-13a. Alternatively, he found that petitioner's arrest was proper because it took place in the doorway after petitioner had answered the agents' knock. *Id.* at 14a. Once the arrest was made, the magistrate concluded, the agents were entitled to conduct a sweep search of the apartment. *Ibid.*

Without disturbing any of the factual findings of the magistrate, the district court applied *Payton* retroactively and held that the agents had required a warrant to arrest petitioner. Pet. App. 69-70. The court also held that the warrantless intrusion was not justified by exigent circumstances (*id.* at 70), an issue the magistrate had not discussed. It therefore suppressed all evidence seized from the apartment before the search warrant was obtained. *Ibid.* The court further held, however, that the warrant application

contained sufficient facts exclusive of the tainted evidence to establish probable cause. Hence, the district court denied petitioner's motion to suppress the evidence seized pursuant to the warrant. *Id.* at 70-71.

The court of appeals reversed, holding that none of the evidence should have been suppressed. Its decision rested on two independent grounds. First, the court held that *Payton* should not have been applied retroactively and hence no warrant was required. Pet. App. 32-40. Alternatively, the court held that exigent circumstances justified the warrantless arrest (*id.* at 42-43):

> [I]n the instant case, officers maintained surveillance of an apartment belonging to arrested co-conspirators [*sic*] Bennett's source. Having previously listened to a taped conversation between Bennett and his source, Brock, in which the latter had assured Bennett that he would obtain more drugs later that night or the next morning for another deal, the police's observation * * * of two individuals entering and leaving the apartment carrying packages gave rise to their reasonable belief of ongoing criminal activity within. Moreover, given [petitioner's] instruction that Bennett should return to the apartment that night, Bennett's failure to do so * * * would surely have aroused petitioner's suspicion. These circumstances, coupled with the relative ease with which narcotics may be disposed of, clearly meet, if not surpass, the requisite level of exigency * * *.

3. Petitioner correctly contends that the court of appeals' disposition of the retroactivity question conflicts with *United States* v. *Johnson*, No. 80-1608 (June 21, 1982).[4]

---

[4]In *Johnson*, this Court applied *Payton* "retroactively to all convictions that were not yet final at the time the decision was rendered." Slip op. 24.

Despite this error in the opinion below, the arrest entry nevertheless was lawful because it was justified by the exigent circumstances exception to the warrant requirement, as the court of appeals alternatively held. See *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967). Accordingly, the outcome of this case does not depend on the retroactivity question raised by petitioner.

Whatever the merits of petitioner's claim that there were no exigent circumstances, that issue is not presently ripe for review by this Court. Petitioner has yet to be tried, and further proceedings have been stayed pending disposition of this certiorari petition. The court of appeals' decision places petitioner in precisely the position he would have occupied had the district court denied his suppression motion in the first instance; in that case, he would not have been permitted to appeal prior to trial. If petitioner is acquitted following a trial on the merits, his conviction will be moot. If, on the other hand, he is convicted, he will be able to present the exigent circumstances question to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Consequently, review by the Court at this time would be premature.[5]

---

[5]In any event, the court of appeals' determination of exigent circumstances was correct and raises only a factual issue unworthy of review by this Court. The agents knew that petitioner was trying to obtain more cocaine, and they saw two men carrying attache cases enter and leave petitioner's apartment. They thus could have concluded that either a delivery or another sale had just been made.

The agents also knew that petitioner was expecting Bennett. It was reasonable to suppose that he would have become suspicious when Bennett failed to come. Accordingly, and in view of the particularly volatile nature of narcotics transactions—evidence is readily destroyable and participants generally are armed (as they were here)—immediate action was necessary. In such circumstances, the Fourth Amendment does not require a warrant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

DOJ-1982-09

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-1-Cr-JWK

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

REPORT & RECOMMENDATION

LORAN A. BENNETT,
SANFORD RAYE MITCHELL,
JACK BROCK,
JOANNE ELAINE MARSZALKOWSKI,

Defendants.

Evidentiary Hearings were duly held before the undersigned on February 26, March 18, March 19 and March 20 and 28, 1980 on the respective Motions of the defendants, Jack Brock and Joanne Marszalkowski, to Suppress Statements made by them and Physical Evidence Seized, and on the respective Motions of the defendants, Loran Bennett and Sanford Raye Mitchell, to Suppress their Confessions, Admissions and Statements and to Suppress Evidence obtained through unlawful electronic surveillance of Wire and/or Oral Communication.

The following are the Findings of Fact, Conclusions of Law and Recommendation of this Court.

I. FINDINGS OF FACT

1. On November 7, 1979, Drug Enforcement Administration Agent, Charlie Brown, went with Agent Thompson to the place of business of the defendant, Loran Bennett, at

16419 N.W. 67 Avenue, Dade County, Florida, and conversed with him relative to the delivery of four kilograms of cocaine the next day. (T 6).

2. On November 8, 1979, after several phone conversations with Mr. Bennett, arrangements were made with him to meet Agents Brown and Thompson at the Ramada Inn, 7200 N.W. 11 Street, Miami, Florida.

3. At the said Ramada Inn, the Agents met Bennett and the defendant, Sanford Raye Mitchell, showed them $58,000 cash for the delivery of one kilogram of cocaine. (T 6).

4. At the time of arrest, Bennett and Mitchell, each had a loaded weapon on their person and in the vehicle utilized to deliver the kilogram of cocaine were two weapons. (T 8). Actually, the initial frisk of Mitchell did not turn up any weapon and he told the agents he had a gun (T 497, 521).

5. The defendants, Bennett and Mitchell thereupon were arrested at about 9:30 p.m., and taken to the Drug Enforcement Administration Office. (T 7).

6. Miranda rights were read to defendants Bennett and Mitchell at the time of their arrest. (T 8, 72, 127). No written waiver of rights was asked of the defendant Bennett and none was obtained (T 68).

7. Regardless as to whether Miranda Rights were actually read to Bennett and Mitchell at the moment of their arrests, Miranda rights as to the defendant, Bennett, were read to him by D.E.A. Agent Louis P. Perry from a BND 13A Miranda Warning Card (Defendant's Exhibit 2) in Agent James Peacher's vehicle in the Ramada Inn area just prior to his being transported to D.E.A. Headquarters (T 156, 279). (Defendant Bennett did not testify to the contrary).

Miranda rights as to the defendant Mitchell were read to him by D.E.A. Agent Louis P. Perry from a BND 13A Miranda Warning Card while Mitchell was placed in Agent

Perry's vehicle in the Ramada Inn area just prior to his being transported to D.E.A. headquarters (T 158). (Defendant Mitchell testified no Miranda rights were read to him. (T 500, 526).

8. This Court visited the Ramada Inn area under conditions similar to those which existed the night of November 8, 1979 and finds that there would be sufficient illumination from the interior car light for one to be able to read the Miranda warnings from a BND 13A card.

9. Defendant Mitchell stated to Agent Perry and Mr. Bennett told Agent Brown that Mitchell was just riding as a bodyguard for Mr. Bennett just to earn a few dollars (T 161, 535). Mitchell further stated that he had gone to a man's house in Hialeah; that the man and Bennett went somewhere and that a woman was sent out to talk to him (T 161) and that he remained in the kitchen. Mitchell agreed that he would cooperate. (T 162, 506).

10. Bennett was concerned about publicity affecting the election of his brother and Agent Perry stated that, "We could keep it out of the paper as far as D.E.A. is concerned until he went to the preliminary hearing . . . but D.E.A. itself would not call anybody and you know, call the press. (T 163, 237).

11. Bennett was concerned about his brother's election and his family, his wife, the house and the business. (T 234).

12. No physical violence or force was used by any of the arresting officers or those in attendance to compel or induce the defendant Mitchell to make any statements. Any bruises on the wrists of Mr. Mitchell were from the tightening of his handcuffs.

13. No physical violence or force was used by any of the arresting officers or those in attendance to compel or induce the defendant Bennett to make any statements or to cooperate with them. (T 357).

14. After his arrest and after he had been interviewed by the D.E.A. Agents, defendant Bennett made a telephone call from the D.E.A. headquarters to the person from whom he received the cocaine No. 882-9081 (T 10) and whom he designated as Jack, possibly Jack Brock. Such call was made at the request of the D.E.A. Agents at about 11:10 p.m. (T 98), and it was taped. The Agents told him what to say. (T 234).

15. Bennett gave the Agents the location of the apartment where he had secured the cocaine, 1950 W. 54 Street, Apt. 111, Hialeah, Florida (T 8) and a description of the man whose first name he said was Jack and whom he believed the full name to be Jack Brock. (T 163).

16. According to Agent Perry, the description of "Jack" was of a small man with a pot belly grey hair and a beard. (T 243-44). It was stipulated that Brock did not have a beard at the time of his arrest and that Brock was residing in the apartment. (T 491). However, the Court notes that defendant Brock with a beard was present at the Hearing and sitting in front of Agent Perry so that the description recited by Agent Perry could well have been influenced by Brock's presence. (T 243).

17. Prior to the name of Brock being given by Bennett, the Agents had never heard of Brock. (T 35, 240).

18. Two units were dispatched by the D.E.A. Agents to sit on the apartment while they were still talking to Bennett. (T 163).

19. The Agents had a "good suspicion" that Brock was at the apartment to which they were directed. (T 40).

20. While the surveillance was going on two males of average height and build were observed entering and then exiting the apartment. (T 307, 308).

21. Two men entering and two men leaving would still leave another man in the apartment who very well could have been the person who had spoken on the phone to Mr. Bennett shortly before.

22. The apartment had two doors in close proximity (T 288).

23. All but one of the agents went to the front door and Agent Walde went to the kitchen door and leaned against it (T 288-89).

24. After agents knocked on the front door, the kitchen door was opened by Mr. Brock who stuck his head and torso out of the door (T 337-38).

25. Agent Walde who was leaning against the door, fell into the kitchen.

26. The other agents immediately entered and identified themselves as Federal Agents (T 289) and moved towards Brock as he stepped back. (T 315-16). He was asked who he was. At that time, the Agents had determined who he was and he was arrested. (T 316). "He answered the description we had." (T 317).

27. No warrant for the arrest of Jack Brock had been issued.

28. At the time the agents entered the apartment, at least several of them had their guns drawn. (T 311, 335).

29. Accordingly to the agents they recognized Brock as the man who had been described by Bennett (Congote hearing, T 59).

30. The Agents had previously received information from Bennett and Mitchell that a female was the only other person in the apartment. (T 368).

31. When the agents entered the apartment Mrs. Marszalkowski was a few feet from Mr. Brock and was plainly visible to them. (T 342-43, 368).

32. After their entry of approximately two to six feet into the kitchen, the agents observed several items: a mirror with a formula for cocaine with a white powder, a cutting instrument and currency on a coffee table in the living room. (T 290, 370). The Court made a personal inspection of the kitchen and could observe the top of the coffee table upon entering into the kitchen from the outside kitchen door.

33. Despite the fact that Brock had been arrested and Mrs. Marszalkowski was being detained, the agents began what they classified as a sweep to look for other persons, although they had no information that other persons were present. (T 367-68).

34. During this protective sweep, the agents discovered several items including a gun on top of the bed, a scale and a vial of cocaine. (T 368-71).

35. When Agent Velasco returned to the living room from conducting a protective sweep, he observed under the coffee table a plastic bag containing a white powder. (T 369).

36. When Mrs. Marszalkowski was detained, she was asked to sit in a chair. (T 292).

37. After being brought to the chair by the agents, the agents opened a desk drawer located next to the chair in which they requested Mrs. Marszalkowski to sit and discovered a gun. (T 292).

38. After arresting Brock and Marszalkowski, the agents decided to procure a search warrant.

39. They secured the apartment and Agent Velasco and another agent remained to ensure that no one entered. (T 374).

40. They were relieved by Agent Preacher and another agent at approximately 8:00 a.m. in the morning, and they remained until the warrant was executed. (T 327).

41. The search warrant was executed at approximately 3:00 p.m. (T 329).

42. The following items were seized during the execution of the warrant:

A. 376 grams of cocaine in a plastic bag found under the living room table. This item was originally seen by Agent Velasco upon his re-entry into the living room after the protective sweep. (Exhibit 2 on DEA Report)

B. 157.8 grams of cocaine in a plastic bag found in the bedroom storage closet. (This item was found by Agent Velasco [Exhibit 3 on DEA Report])

C. 49.8 grams of cocaine in a container found in a living room cabinet (Exhibit 4 on DEA Report)

D. 56.2 grams of methaqualone pills in a plastic bag found in a bedroom dresser (Exhibit 5 on DEA Report)

E. 27.1 grams of cocaine in a plastic bag found in a bedroom dresser (Exhibit 6 on DEA Report)

F. 27.5 grams of cocaine in a plastic bag contained in greem [*sic*] box found in a bedroom dresser (Exhibit 7 on DEA Report)

G. 34.7 grams of cocaine in a plastic bag found in a bedroom table (Exhibit 8 on DEA Report)

H. 49.7 grams of cocaine in a plastic bag found in a bedroom table (Exhibit 9 on DEA Report)

I. 45.8 grams of cocaine in a vial found in the bathroom (Exhibit 10 on DEA Report)

J. 30.3 grams of cocaine in a vial found on the top of the bedroom dresser. This item was originally seen during the sweep by Agent Velasco (Exhibit 12 on DEA Report)

K. A greem [*sic*] box which was the original container for the 27.5 grams of cocaine referred to in Item F (Exhibit G on DEA Report)

L. $10,750.00 found in a bedroom dresser (Exhibit H on DEA Report)

M. A .357 Colt Python found in a living room desk drawer. This item was found when Mrs. Marszalkowski was asked to sit in a chair by the agents and the desk drawer was opened (Exhibit I on DEA Report)

N. An RG-14 22 caliber found in the bedroom dresser by Agent Velasco (Exhibit J on DEA Report)

O. A .38 Charter Arms found on top of the bed in the bedroom. This item was originally seen as part of the sweep (Exhibit K on DEA Report)

P. A .38 Smith and Wesson found in the bedroom night table (Exhibit L on DEA Report)

Q. Miscellaneous bullets found in the bedroom dresser by Agent Velasco (Exhibit P on DEA Report)

R. A Triple Beam Ohans Scale found in the living room which was originally seen on the sweep (Exhibit Q on DEA Report)

S. A cocaine heat tester found in the bedroom dresser (Exhibit R on DEA Report)

T. Various narcotics paraphernalia (Exhibit S on DEA Report)

43. The information which was contained in the affidavit for the search warrant was obtained through the arrests of Bennett and Mitchell and through the information supplied

by them (See Paragraph 2 and 3 of the affidavit sworn to November 9, 1979 in support of the application for a search warrant) and through the agents entry into the apartment and the subsequent sweep of the apartment. The warrant was based upon such affidavit.

II. CONCLUSIONS OF LAW

1. The statement made by the defendant, Loran Bennett, were made by him after having been duly notified of his Miranda rights. While Mr. Bennett may have been concerned about his arrest adversely affecting his brother's election and embarrassing his family, the making of statements by him and his cooperation with the Drug Enforcement Agents were voluntary acts on his part and not coerced.

2. The recording of his phone conversation with defendant Brock was done with his consent and was a consensual recording made in support of law enforcement. Similarly, the taping by D.E.A. Agents of any of his phone calls with them was lawful and proper.

3. The statements made by the defendant, Sanford Raye Mitchell, were made voluntarly after having been notified of his Miranda rights. Actually, the defendant, Mitchell, seemed anxious to convince the D.E.A. Agents that he was not involved in any sale of contraband but was merely acting as a guard for Loran Bennett.

4. The projected entry into the apartment at 1950 W. 54 Street, Apartment 111, Hialeah, Florida, was based on reasonable suspicion and probable cause to believe that the defendant Jack Brock was in the premises.

5. The D.E.A. Agents had probable cause to make the arrest of Jack Brock for having distributed cocaine to Loran Bennett.

6. The D.E.A. Agents, based upon the statements made to them by both defendants, Bennett and Mitchell, and based upon the phone call by Bennett to Brock, had good reason to believe that Jack Brock had committed a felony in having distributed a kilogram of cocaine to Bennett.

7. Upon knocking on the doors of the apartment, the door was opened by Jack Brock, who was recognized by the agents as being the person they were looking for.

The law established in the Fifth Circuit prior to the decision of the United States Supreme Court in *Payton* v. *Riddick*, Nos. 78-5420 and 78-5421, April 15, 1980, 27 Cr. L. Rep. 3033, is that a police officer may enter the home of and arrest without a warrant, one believed by him on reasonable cause to have been guilty of a felony.

> The rule is that without a warrant a police officer may arrest one believed by the officer on reasonable cause to have been guilty of a felony, *United States* v. *Watson*, 432 U.S. 411, 96 S. Ct. 820, 46 L.Ed.2d 898 (1976).
>
> This should end the matter, except that the *Watson* opinion stated that the question is still unsettled:
>
> > "[W]hether and under what circumstances (emphasis ours) an officer may enter a suspect's home to make a warrantless arrest", 423 U.S. at 418, footnote 6, 96 S. Ct. at 825.
>
> We think, however, that until the Supreme Court declares otherwise, the question is settled in the Fifth Circuit.
>
> A federal statute specifically provided's [*sic*] that agents of the Federal Bureau of Investigation may
>
> > "make arrests without warrant . . . for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the

> person to be arrested has committed such a felony", 18 U.S.C. Section 3052.

Another federal statute provides that an officer may break any outer door to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance, 18 U.S.C. Section 3107.

Although the statute facially applies only to searches pursuant to a warrant, it also applies to *warrantless* intrusions when necessitated by exigent circumstances, *United States* v. *Seelig*, 5 Cir., 1974, 498 F. 2d 109, 113. *Seelig* further held that even the required notice may be dispensed with under exigent circumstances.

Only searches and seizures are specifically mentioned in the Fourth Amendment. If we assume, but without deciding, that the Fourth Amendment applies also to arrests accomplished in the house of the person arrested, the requirements for an arrest should a *fortiori* be no more stringent than those for a search.

Relying on *Miller* v. *United States*, 357 U.S. 301, 78 S. Ct. 1190, 2 L.Ed.2d 1332 (1958), we held in *Seelig* that even the *notice* may be excused

> "if the facts known to the officers would justify them in being virtually certain that the [occupant] already knows their purpose so that an announcement would be a useless gesture", 408 F. 2d at 113.

United States v. *Williams*, 573 F. 2d 348 at 350.

The decision of the Supreme Court in *Payton* v. *Riddick*, should not be given retroactive application to pending cases. Thus the rule in *United States* v. *Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L.Ed.2d 538 (1977) has been held not to be applied retroactively.

That being the case, retroactive operation of *Chadwick* is improper. Under *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), three factors are considered in determining that a decision will not be applied retroactively. Consideration is given to whether the decision establishes a new principle of law and to whether, in view of the history and purpose of the new rule, retroactive application will serve to promote or retared [*sic*] the operation of the rule. Any inequity resulting from applying the rule retroactively is also weighed. We have already expressed our opinion that the *Chadwick* decision broke new ground in applying the exclusionary rule to the kind of search at issue here. The obvious purpose in doing so was to further

> "safeguard individuals from unreasonable government invasions of legitimate privacy interests",

United States v. *Chadwick, supra*, 433 U.S. at 11, 97 S. Ct. at 2483 (Footnote omitted), by deterring police from obtaining evidence without a warrant.

That purpose, i.e., deterrence of police conduct contrary to the Fourth Amendment, would not be served in applying *Chadwick* to incidents which occurred before the decision. That retroactive application may operate to vindicate the rights of individuals, like appellant, who have been subjected to unreasonable police conduct under current standards is not dispositive. *Weinberg* v. *Mitchell*, 588 F. 2d 275 (9th Cir. 1978). Inequity on both sides of the coin must be considered. As fully explored below, the officers' conduct in this case conformed in every respect to the Fourth Amendment standards of this circuit which prevailed at the time the attache case was seized and examined. It would be inequitable to the public as well

as its law enforcement personnel to invalidate the efforts which resulted in Stewart's arrest on the basis of a constitutional principle established after the fact.

United States v. *Stewart*, 595 F. 2d 500 (9th Cir. 1979), at P. 504. As stated in *Chapman* v. *United States*, 553 F. 2d 886 at 890 (5th Cir. 1977):

> The Supreme Court's test for whether a "new Rule" in the area of criminal procedure is to be retroactively applied calls for the consideration of three criteria:
>
> > "(a) the purpose to be served by the new standards,
> >
> > (b) the extent of the reliance by law enforcement authorities on the old standards; and
> >
> > (c) the effect on the administration of justice of a retroactive application of the new standards."
>
> *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967); *Linkletter* v. *Walker*, 381 U.S. 618, 629 85 S. Ct. 1731, 1737, 14 L.Ed.2d 601 (1965).

See also: *Linkletter* v. *Walker*, 381 U.S. 618, 85 S. Ct. 1731 (1965), refusing to apply *Mapp* v. *Ohio*, 367 U.S. 643 retroactively; *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967) limiting the right to counsel at post indictment lineup, granted in *Wade & Gilbert* to lineups which took place *after* the date of these decisions; *Desist* v. *United States*, 394 U.S. 244, 89 S. Ct. 1030 (1969) where the Court limited its decision in *Katz* v. *United States*, 389 U.S. 347, 88 S. Ct. 507 (1967) to warrantless electronic surveillance conducted subsequent to the *Katz* doctrine; and *Williams* v. *United States*, 401 U.S. 646, 91 S. Ct. 1148 (1971), where the Court held that its earlier decision in *Chimel* v. *California*, 395 U.S. 752, 89 S. Ct. 2034 (1969) should not be applied retroactively.

Even if we were to assume that the *Payton* v. *Riddick, supra*. Rule was to be applied retroactively, the arrest in the instant case of the defendant Brock was proper for it was Brock who opened the door in response to the knocking thereon by the D.E.A. Agents and once he was observed at the door, the arrest was proper. Once the arrest was made, the Agents had the right to enter further into the premises to secure the same against any others being there. The fact that they were told by Bennett that they could expect only Brock and Mrs. Marszalkowski, this did not exclude the possibility that others could be or would be there. As efficient and careful officers, they were to "sweep" the place for anyone else who might be there.

Once they effected the security search and they observed in plain view narcotic implements and a vial of white powder and a bag of white powdery substance, they had the right to effect the arrest of Mrs. Marszalkowski. The search of the dresser or table drawer in the immediate vincinity of Mrs. Marszalkowski was proper even though they had placed her in such vicinity. There was no sham at setting her in several different places and effecting a search at each such place.

The search pursuant to the search warrant was proper. The affidavit was based on probable cause. There was sufficient probable cause for the warrant's issuance even without any of the facts ascertained during the arrest of Brock and Marszalkowski and the security sweep thereafter. If paragraphs 4 and 5 and the first sentence of paragraph 5 of the affidavit are regarded as surplusage, there were sufficient facts alleged in the affidavit to support the search warrant. Accordingly, all of the items seized pursuant to the search warrant were properly seized and should not be suppressed. Included in these items are the specifics which the defendants Brock and Marszalkowski move to suppress. Accordingly, even if the entry was to be held to have been unwarranted and unlawful, nevertheless, the evidence seized

pursuant to a valid search warrant would have been properly seized.

III. RECOMMENDATION

It is respectfully recommended

1. That the respective Motions to Suppress submitted by the defendants be DENIED.

DATE at Miami, Florida this 4 day of JUNE, 1980.

HERBERT S. SHAPIRO
UNITED STATES MAGISTRATE

cc: Counsel of Record